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JAMES D. MAHER,
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Supreme Court of the United States.

October Term, 1918.

No. 649.

ALVAH CROCKER ET AL., TRUSTEES,
Petitioners,

v.

JOHN F. MALLEY, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Petitioners.

FELIX RACKEMANN,
HARRISON M. DAVIS,
Of Counsel for Petitioners.

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v.

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BRIEF FOR THE PETITIONERS.

This case comes to this Court on certiorari to review the action of the Circuit Court of Appeals for the First Circuit, in disposing of cross writs of error arising from a suit of Alvah Crocker *et al.*, Trustees, against John F. Malley, Collector of Internal Revenue for the District of Massachusetts, to recover $10,875.40 of Federal income taxes assessed to the plaintiffs as a "joint stock company or association" under section II, subdivision G (*a*), of the Act of October 3, 1918 (38 Stats. at Large, 166-172).

The plaintiffs in that suit contended that they were strict trustees, required under another section of the statute, sub-division D, to make returns as fiduciaries and to withhold and pay, on income distributed by them to their trust beneficiaries, the normal tax levied by the Act on incomes of individuals.

The District Court gave judgment for the plaintiffs for the amount which they claimed to recover as having been illegally assessed and collected, less the sum of $1321.33, for which sum the Court found that the plaintiffs might lawfully have been assessed for the

year 1915, as fiduciaries, under sub-section D, above referred to.

Both parties sued out writs of error, the Collector to review the entire judgment, the plaintiffs to review that part of the judgment which disallowed the sum of $1321.33.

The plaintiffs' writ of error was dismissed without consideration of the question raised by it, because, on the main question, raised by the Collector's writ of error, the Circuit Court of Appeals decided against the plaintiffs, ordered the judgment of the District Court to be reversed and judgment entered for the defendant.

A petition for rehearing was denied by the Circuit Court of Appeals on June 10, 1918. (Record, p. 57.)

Jury trial was waived and the case was presented and tried in the District Court on the pleadings and agreed facts. (See Record, pages 12 *et seq.*)

The agreed facts (Record, page 13) show substantially the following summarized situation:

The Agreed Facts.

Long years ago Crocker, Burbank & Company did business at Fitchburg, Massachusetts, as a partnership, manufacturing paper. After many years they incorporated their business in Maine and continued for many years under the Maine charter. In 1912 they reincorporated in Massachusetts, the stockholders being a few of the members of the families of the former partners.

The concern had a number of mills on the Nashua River, and, to protect the water from pollution, had

acquired considerable outlying real estate not otherwise pertaining to the business.

On reincorporation in Massachusetts there was transferred by the Maine company to the Massachusetts company fee-simple title to seven of the mill properties.

One other mill then in process of construction, and the outlying parcels of real estate, and some tenements, occupied by employees, were leased by the Maine company to the Massachusetts Company for a long term of years.

It was desired that the Maine company might be liquidated and dissolved. Pending the development of further plans, on the suggestion of Mr. Alvah Crocker, president, the fee-simple title to the leased premises above mentioned was taken into the hands of himself and four associates, as trustees, for liquidation. Pending the liquidation the shares of the Massachusetts corporation taken by the Maine company in payment were also left in the hands of the same trustees.

This arrangement was assented to by each individual shareholder of the Maine corporation *merely* by the surrender of the old Maine company shares, and the acceptance of trust receipts issued by the plaintiffs as trustees under a declaration of trust, which they then made, and which appears as Exhibit A, Record, pages 9 *et seq.*

For convenience a copy of the Trust Declaration is printed as Appendix A at the end hereof. (Page 54.)

The new Massachusetts corporation thus acquired the business and seven of the mills in fee and a lease of the eighth mill (then in process of construction) and of the outlying and tenement properties.

The plaintiffs, as trustees under the declaration, took the title to this eighth mill and the outlying properties, subject to the lease, and also took, as trustees under the same declaration, the shares of the Massachusetts corporation.

The former shareholders of the Maine corporation took the trust receipts of these trustees in exchange for their former shares of the Maine company, and the Maine company was dissolved.

The form of the trust receipt appears. (Record, page 15.) The receipts are without par value, and merely entitle the holders to fractional parts of final "net proceeds," etc.

The trustees have continued to hold the title and shares so conveyed to them subject to the lease. They have received from time to time rental from the Massachusetts corporation, and the dividends as declared on the stock of that corporation, and "have disbursed such income, less charges and disbursements for taxes and similar expenses, to their several beneficiaries in proportion to their respective interests." (Record, foot page 14.)

The trust is stated to be for purpose of conversion into money and distribution. (Art. 1, Declaration of Trust, Record, page 9.)

The Revenue Department, for two years, assessed income taxes to Crocker and associates *as fiduciaries*, but then reversed itself and assessed them as an association, or quasi-corporation. The taxes so re-assessed were paid to the defendant Collector under protest, and this suit is to recover them back.

The Questions of Law at Bar.

The Record presents two questions:

1. Are the plaintiffs entitled to recover back the taxes paid? This question is raised by the writ in *Malley, Collector*, v. *Crocker et al.*, No. 1324 in the Circuit Court of Appeals.

2. If the plaintiffs are entitled, did the District Court err in deducting from the plaintiffs' claim for taxes assessed against them *as an association* (for 1915) the sum of $1321.33, and entering judgment for the balance only, on the theory that the plaintiffs might have been assessed *as "fiduciaries"* for $1321.33 under another section of the Act. This question is raised by the writ in *Crocker et al.* v. *Malley*. (C.C.A. No. 1323.)

I.

We take up first the main question:

Are the Original Plaintiffs Entitled to Judgment?

The plaintiffs claim to be strict fiduciaries under the declaration of trust, Exhibit A (Record, page 9), and taxable under the Act of Congress as such fiduciaries. The Collector claims that the plaintiffs, trustees—or their *cestui que trusts*—or both together—form a "joint-stock association" within the meaning of the Act of Congress, and are taxable as such.

It will, therefore, be seen at the outset that the question involved in the case at bar is whether the plaintiffs under their declaration of trust are merely fiduciaries, or an association, or joint-stock association.

The Income Tax Law (Act of Congress of October

3, 1913, 38 Stats. 166) in section II, sub-section D, provides specifically for returns of income of their beneficiaries by, and the taxation thereon of, "guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity."

Sub-section G, paragraph *a*, provides for the taxation of "every corporation, joint-stock company or association and every insurance company organized in the United States, no matter how created or organized, not including partnerships."

Sub-section A provides for the taxation of individuals.

Quotations from these sections are printed in the Appendix. (*Post*, pages 60 *et seq.*)

The Act of Congress, therefore, itself clearly recognizes the distinction between the fiduciary and the association or quasi-corporation; and from the language of the sub-sections last-above quoted ("not including partnerships") it would even seem doubtful if Congress intended that any body should be excluded from this class except the ordinary commercial partnerships.

In many states there are statute provisions for the formation of joint-stock companies or *associations* of various kinds and for various purposes. Military, educational, religious, agricultural, medical, and others are common, and there are also workingmen's and firemen's associations, various forms of protective association, and various forms of charitable organization. The stock exchanges and trade unions are other examples. Many of these have large invested funds and considerable incomes.

In Massachusetts there is no statute provision in respect of any such association as the Collector claims to exist in the case at bar, and the contention of the defendant must, therefore, rest either upon the quasi-partnership theory or some other entirely vague and general construction of the words "joint-stock company or association."

STRICT TRUSTS AND QUASI-PARTNERSHIPS.

First we take up the question as to where the strict trust relation ends and the quasi-partnership (or "association") relation begins.

That there are clear and sharp distinctions in the law between trusts and partnerships goes without saying.

The "partnership" is one growth and development of the law; the "trust" is a separate and entirely different growth and development. The original reasons for these two legal creations were entirely different; the purposes and objects were entirely different; the histories and courses of development have been different; and down to the present day they stand as two entirely independent creatures of the law, each serving its own useful purpose, but having little in common.

In the case of the partnership we find two or more contributors (of some kind of value) to a common fund for a common business purpose, and for joint account, either profit or loss, the contributors having themselves, or through some deputation, the management and control.

In the case of the trust we find one or more persons, with varying forms of beneficial interest in a common property or the income thereof, *but without association inter sese*, and *without voice in the management thereof;* the entire legal title and control, management, and general authority being in the trustee as such.

The two come close together in the case of the quasi-partnership, or so-called "association" of many members, which puts the title to its real estate (and perhaps other property) in a trustee for greater convenience in immediate management and conveyance.

Convenience and business demand have, in modern times, developed this species of *combination* of trust and partnership, where the title is held for beneficiaries, who, beside being trust beneficiaries, are also quasi-partners *inter sese*.

But even in these cases there is no mingling of the legal principles. There is the trust and there is the partnership. They are absolutely distinct. The only novelty is that the "*cestui que trusts*" are also "associates" or "partners" *inter sese;* or perhaps, more strictly, the sole *cestui que trust* is the partnership entity.

It is obvious, however, that all *cestui que trusts* are not partners *inter sese*, and, if they are not, their trustee is not trustee for any partnership.

We must first, therefore, determine when and under what circumstances are trust beneficiaries partners *inter sese*.

It is submitted that the law has, down to the present day, never known any such thing as a partnership in

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JAMES, L.J., in his opinion, says, of the various contributors to this trust:

> "I cannot myself find in this any association whatever between the persons who are supposed to be *socii;* . . . they have never come into any arrangement whatever as between themselves. There never has been anything amounting to any mutual rights or obligations as between those persons, . . . Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or an interest severally in something which is to be divided between them."

As to whether or not there was any business carried on by associates, JAMES, L.J., says:

> "The association—that is to say the body of subscribers or the body of certificate holders—do not, as it appears to me, carry on any business. They cannot be said to carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability upon them as such. I cannot conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate holders either by any member of themselves, or by any other agent or manager for them."

As to the carrying on of the business, the same opinion says that the business, if any, is carried on by trustees, and that they were trustees and not directors or agents of the certificate holders.

> "To my mind the distinction between a director and a trustee is an essential distinction; it is a distinction which lies in the very nature of things. A trustee is a man who is the owner of the prop-

> erty, who is the principal, who deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestui que trusts*. . . . The office of director is that of a paid servant of the Company. He never enters into a contract for himself, . . . he enters into contracts for his principal and that principal is the company of whom he is a director and for whom he is acting."

The same reasoning in shown in the opinion of BRETT, L.J.

Smith v. *Anderson* has been recognized as the controlling authority since its decision; see Lord COLERIDGE in *Crowther* v. *Thorley*, 50 L.T. 43, in the decision of which BRETT, M.R., affirmed his views as expressed in *Smith* v. *Anderson*, and BOWEN, J., concurred.

See also *In re Siddall*, 54 L.J. Ch. 682.

And in a still later case, *In re Thomas, ex parte Poppleton*, 54 L.J. Q.B. 336, the distinction is again emphasized between the case of beneficiaries having interests in a trust fund and associates having interest in a common fund managed by themselves or their agents, or committee, the Court saying:

> "The committee did not carry on business as trustees like those in *Crowther* v. *Thorley* but carried on business as agents and officers of the society."

The commercial and building society involved in this case was therefore held to be within the Act.

So much for the definitely settled law of Massachusetts and of England.

The United States Authorities.

In this Court the law is the same, and the case of *Taylor* v. *Davis*, 110 U.S. 330, is helpful, and perhaps conclusive.

In that case, as in the case at bar, there was a declaration of trust. The trustees were thereby given the fullest powers to make contracts, incur obligations, make improvements on the lands, and purchases, and sales, and leases, and donations, and investments "expedient to promote the interests of the shareholders." The trustees did erect levees, made river improvements, built roads, cleared land, built a hotel, laid out a cemetery, ran a steamboat, operated a quarry and a ferry, established a newspaper, platted a city and additions, constructed wharves, etc., and yet the Court held that there was a strict trust, and in the opinion distinguished very clearly the position of trustee from that of agent.

There is, in *In re Associated Trust*, 222 Fed. 1012 (1914), a clear and careful opinion of Morton, J. (Mass. Dist.), involving exactly the same distinctions and principles as are urged by the plaintiff in this brief.

In that case there was an involuntary petition in bankruptcy against "The Associated Trust." The question was as to the legal character of the so-called trust and whether it might be considered an "unincorporated company." The Court, in deciding that question, referred to the decision in *Williams* v. *Milton*, 215 Mass. 1, and says:

> "The legal character of trusts resembling the respondent has several times arisen in the Massachusetts courts, generally upon question of taxation, and the court has been called upon to decide

whether they were to be taxed as partnerships or as ordinary trusts. In some cases such organizations have been held to be partnerships and in others to be strictly trusts. The distinction between the two turns upon the provisions of the trust agreement or declaration. In cases where, by the declaration of trust, the shareholders are given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control the trust is held for the purposes of taxation, to be of the same sort as the usual testamentary trust and not to be a partnership. No middle ground is found in the Massachusetts decisions."

The Court goes on in recital of the character of the "Associated Trust" to say that the declaration covered one million dollars paid in to the trustee, for transferable certificates which should be issued by him entitling the interest and participation in surplus earnings, and after a period of years to receive from the trust the face value upon surrender thereof, the trustee being given broad powers as to the management of the property, with the right to determine what part of the income should be divided and what retained as surplus, the certificate-holders having no power to interfere directly in the management of the property, and having no title to it, and there being a "Board of Directors" who may be appointed by the trustee, and removable by him, their duties being merely advisory. The Court says:

> "Up to this point there would seem to be nothing in the organization differentiating it, under the Massachusetts decisions, from what may be called an ordinary trust; that is the beneficiaries, cestuis, or stock holders (whichever they may be called) have no interest in the trust property and no right of joint action for control of it. They are in sub-

stance like beneficiaries in a trust under a will. *There is no organization having a distinct entity apart from the trustee.*"

If no organization no "association," "however organized."

For the reason that the declaration of trust in the case of the "Associated Trust" went further, and provided that the certificate-holders might hold meetings and elect new trustees and fill vacancies, and vote by proxy, and have special meetings, and might, on vote, determine the trust and increase the shares and amend the declaration, the Court held that the certificate-holders had voluntarily united in a business organization with certain rights to be exercised by joint action of all the certificate-holders, and that therefore they did constitute "an unincorporated company."

It is only necessary to call attention to the fact that none of the elements upon which Judge MORTON's decision specifically rests appear in the case of the "Wachusett Realty Trust" declaration under consideration here.

The decision directly supports the contentions here argued.

It may be argued on behalf of the collector that, under the declaration of trust made by the plaintiffs here, vacancies in the board of trustees and amendments of the trust declaration may be made by the trustees "*with the consent* of a majority in interest of the beneficiaries," and that such consent indicates associate action; but that precise question was considered by the Supreme Court of Massachusetts in

Williams v. *Milton*, 215 Mass., at page 10, and as to it the Court said:

> "The only act which [under the trust indenture] they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or 'cestuis que trustent' can do is to give or withhold their consent to the trustees taking such action, and the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose, is provided for in the trust indenture."

In addition to all the foregoing there is the memorandum opinion (not reported) of HALE, J., sitting in the Massachusetts District and upon the identical declaration of trust here involved.

In 1914 one of the beneficiaries of the so-called "Wachusett Realty Trust," on the authority of *Eliot* v. *Freeman*, 220 U.S. 178, brought a bill in equity in the District Court of Massachusetts against the present plaintiffs for an injunction restraining them from making return under the Income-Tax Law as an association or quasi-corporation.

The case was argued orally, and further presented on written briefs to HALE, J., who, on May 23, 1914, filed a rescript in the cause reading as follows:

> "*Hale, District Judge.* In this case the question is presented whether the defendants, Alvah

Crocker and others, trustees under a declaration of trust made by them, and called the Wachusett Realty Trust, are taxable under the Act of October 3, 1913, called the Income Tax, as trustees; or should be taxed as agents of an 'association.' On examination of the case, I have no doubt that the defendants are trustees, and that they are taxable under the Act as fiduciaries. There are no elements of an 'association' in the case before me. The leading English authority on the principles involved in this case is Smith v. Anderson, 50 L. J. Ch. 39; see also Williams v. Boston, 215 Mass. 1; Foster v. Milton, 215 Mass. 31; Hussey v. Arnold, 185 Mass. 202. There is no basis for any claim of partnership relation existing among the trust beneficiaries; they are not socii. The case shows there are no mutual rights or obligations. They carry on no business by themselves, or by any agents or representatives; they have not exercised any voice in the management or control of the trust property, or over the defendants, who act strictly as trustees, and have the entire ownership, management and control precisely as though they had been appointed by will to the same position.

"I have no doubt in coming to the above conclusion on the question submitted to me. I have some question, however, as to the decree which should be entered in the case. Upon this I desire to hear counsel."

It was hoped that, following the precedent of *Eliot* v. *Freeman*, that former case of *Crocker* v. *Crocker* might have gone to the Supreme Court at Washington, so that the question could finally be decided as against the Government in that case.

The Department of Justice did not favor such course at that time, and *Crocker* v. *Crocker* went no further.

Mr. Justice Hale's rescript remains, however.

The exact question here at bar has, therefore, been

squarely decided by HALE, J., and by BINGHAM, J., who gave the present plaintiffs judgment.

It is, perhaps, significant that for two years the Treasury Department assessed taxes to the plaintiffs on the fiduciary theory here contended for.

It is certainly very significant that the contention of the Collector in the case at bar means double taxation. The trustees in the case at bar hold a large value in shares of Crocker, Burbank & Company, Inc., a Massachusetts corporation. That corporation, of course, makes its regular return to the Federal Government and pays a tax upon its net earnings. Its dividends are received by the trustees, plaintiffs in this suit. If the Collector succeeds in his contention here that the plaintiffs are an association, it means that these same dividends are taxed again, as the earnings of such an association, whereas, if the dividends are received by the plaintiffs *as trustees*, they are distributed by them to their beneficiaries, free from further claim of normal tax, which the corporation has already paid through its payment of the tax upon its net earnings.

It is probably a matter of common knowledge that the Government does not tax the so-called *railroad and other voting trusts* as associations.

It is surely deserving of notice that the declaration of trust made by the plaintiffs in the case at bar provides in the opening paragraph and in paragraph one that the property is held for conversion "for the benefit of the cestui que trusts (who shall be trust beneficiaries only without partnership, associate or any

the management of the affairs of which no one of the partners had any voice whatever, and for the debts of which no partner was individually liable; and it may be fairly stated that in every partnership some one or more of the partners have, directly or indirectly, the management of the partnership property and personal liability for debts. They may manage the property themselves, or through their control of and power to direct their servants or agents or directors; they may similarly manage, through their control and power (if reserved), to direct the trustee holding their title; but in every case of partnership we find, and must find, some managing, directing, and controlling power in the partners, acting individually or by deputation. If there be no such power and control, *there is no partnership and no association.*

In sharp contrast we have (as in the case at bar) the strict trust, in which the beneficiaries or *cestui que trusts* have their common interests and perhaps equitable titles (or perhaps only rights to an account and share of proceeds realized by their trustee), but who have no immediate right or title to the property and who have no voice or authority in connection with its management or disposition, the *entire legal title and authority* being vested in the trustee.

There is no occasion, if historical development and clear lines of principle be borne in mind, for confusion between the two.

If, by will, a testator leaves property in trust to be invested and managed for the benefit of his six children, income payable to the children in equal shares

until the youngest child becomes twenty-one, the property then to be sold and the proceeds equally divided among the six children, it could not possibly be claimed that the children were in any sense whatever partners.

If, instead of making such a will, the testator, in his lifetime, declared the same trust of the same property, for the same children, there would be no more reason for suggesting that the children were partners.

In neither case would the claim of partnership gain any strength or foundation whatever if the trust, instead of being for six children, were for the benefit of very numerous children and grandchildren.

The fact that the testator, or settlor, was not a relative at all would make no difference.

Neither would the fact that the trust (either by will or deed) was created for the benefit of a number of children, strangers to each other.

Either creation would be a strict trust, and the property would be taxable to the trustee, at the domicil of the beneficiaries, as property held in trust "the income of which is payable to another person." Of this there can be no possible doubt.

This condition and result remains unchanged though the trustee, by the directions of the trust instrument, uses part of the property so held by him to continue some "*business.*"

It remains the same, entirely regardless of any arrangements made, or attempted to be made, by either the testator or trustee, or the beneficiaries, or all of them together, for the issuance of any particular writing evidencing the interests of the beneficiaries, or affecting the transfer of those interests.

It remains the same though one of the beneficiaries

assigns his fractional interest to fifteen nephews and nieces, to whom, perhaps, new written evidences of interest issue.

Every trust beneficiary (in the absence of special provision) has an interest, right, or claim which is assignable. No provision making such assignment easy or difficult can affect the nature of the relation.

This precise question of the significance of scrip certificates or share ownership and the transferability of the same arose in two cases in Massachusetts: *Mayo* v. *Moritz*, 151 Mass. 481, and *Williams* v. *Milton*, 215 Mass. 1; and it was held that, notwithstanding the issue of any such certificates, the results were still strict trusts. (See the language of LORING, J., 215 Mass., at page 8.)

It is clear, therefore, that not all trust beneficiaries or *cestui que trusts* are *partners*.

It is important and helpful to observe the points which clearly follow from the foregoing.

Whether *cestui que trusts* are also partners does not depend—

(*a*) upon the manner of the trust creation;

(*b*) nor upon the pre-existing relations between the settlor, or testator, or trust declarant, and the beneficiaries;

(*c*) nor upon the number of beneficiaries.

(*d*) nor upon the nature of the trust assets, or the use made of them;

(*e*) nor upon the fact that the beneficial interests are evidenced by receipts, certificates, or so-called shares;

(*f*) nor upon any transferability given, or attempted to be given, to such receipts or shares.

None, nor all, of the foregoing would legally result in any legal qualification of an otherwise strict trust nor in any partnership among the beneficiaries.

Some additional element, not thus far appearing, would be necessary to create the quasi-partnership between *cestui que trusts*.

The further element required for the partnership relation is provided when *cestui que trusts* are found with some *control and authority, directly or indirectly*, in the management, and with liability for debts.

For a full discussion of partnership see opinion of Gray, J., in *Meehan* v. *Valentine*, 145 U.S. 611, and cases cited.

A simple illustration may be suggestive and helpful:

X, Y, and Z (brothers) own Blackacre in common, through some inheritance or purchase. They are tenants in common, or co-owners, and nothing more.

Let them, however, go only a little way in severally contributing to a common fund, and jointly co-operating for mutual gain or loss, in some business venture upon Blackacre, and they *may* become partners.

And yet, if, instead of so doing, they join in a conveyance of Blackacre and other property to a trustee in trust to hold, manage, and develop, and pay the net income to X, Y, and Z, and their children, etc., the trustee being in sole and uncontrolled authority, no claim of partnership could be made; and this would remain true, even though the trustee conducted some business on the property. The Slater children are not partners

because their father's will authorized his trustees to carry on the mill business in Webster.

See *Bartlett* v. *Slater*, 211 Mass. 334.

The foregoing is all well-settled and rather familiar law in Massachusetts, and there are a number of cases in Massachusetts in which title has been held by trustees for the benefit of a number of beneficiaries, with such relations *inter sese*, and with such reserved power of management and control, that the Court has found them to be partnerships or quasi-partnerships.

Tyrrell v. *Washburn*, 6 Allen, 466.
Hoadley v. *County Commissioners*, 105 Mass. 519.
Whitman v. *Porter*, 107 Mass. 522.
Cook v. *Gray*, 133 Mass. 106.
Gleason v. *McKay*, 134 Mass. 419.
Phillips v. *Blatchford*, 137 Mass. 510.
Ricker v. *American Loan & Trust Co.*, 140 Mass. 346.
Cunniff v. *McDonnell*, 196 Mass. 7.
Quimby v. *Tapley*, 202 Mass. 601.
Williams v. *Boston*, 208 Mass., at page 500.

In every one of the cases above referred to it appeared that there was some form of control of the affairs of the various associations (direct or indirect) reserved to, and exercised by, the associates, so that there was not only an established relationship among the beneficiaries *inter sese*, but there was the power of control and management making one of the important features of the ordinary partnership.

The distinction here argued for is, however, clearly pointed out and definitely established by the Supreme Court of Massachusetts in two cases: *Williams* v. *Milton*, 215 Mass. 1, and *Foster* v. *Boston*, 215 Mass. 31; in both of which cases the contention was made that the trusts there in question were partnership associations, and in both of which the Court determined otherwise on the distinctions now urged.

In *Williams* v. *Milton* Mr. Justice LORING wrote an exhaustive opinion reviewing the cases and thoroughly discussing the principles involved. That was also a tax case and involved, as here, the question whether, under a certain declaration of trust, the so-called trustees were strict trustees, or whether they and their beneficiaries formed a quasi-partnership association.

No detailed review of the cases above cited is necessary here. *Williams* v. *Milton* states the law and the cases, and the law thus established has been followed more recently in *Ashley* v. *Dowling*, 203 Mass. 311, 317, and *Frost* v. *Thompson*, 219 Mass. 360, 365.

DISTINGUISHING FEATURES OF THE CASE AT BAR.

There are no facts whatever in the case at bar which bring it within the rules laid down in the ten collected cases above cited on page 13.

In the case at bar we have a strict trust. There is no association in fact of any kind; there is no basis for the claim of such association. The agreed facts make the creation of the trust perfectly clear. There are no shareholders' meetings; no beneficiary has any voice in the management, nor any control whatever over the

trustees. There is no delegated authority or management on any theory of agency. There is no reserved power of control. We have simply a case in which certain shares of stock and certain real estate under lease are held by strict trustees under a written instrument. The beneficiaries or *cestui que trusts* have no relations whatever *inter sese;* they are in no sense partners nor "associates" for any purpose whatever.

Whatever might have been, the plaintiffs in fact simply held an invested property, some corporate shares, and some leased real estate. They collected the dividends and the rentals and disbursed the whole net income. (Agreed Facts, Record, foot page 14.)

THE ENGLISH AUTHORITIES.

If we turn to the English authorities we find only confirmation of the principles and distinctions hereinabove set forth.

Statutes 25 and 26 Victoria, c. 89, sec. 4, provided, in substance, that no company, *association,* or partnership of more than twenty persons should be formed to carry on any business (other than banking) for gain, unless registered as a company under the Act; and a number of associations were brought to book and held to be governed by the Act.

Harris v. *Amery,* 35 L.J. C.P. 89.
Jennings v. *Hammond,* 9 Q.B.D. 225.
In re Padstow Association, 20 L.R. Ch. Div. 137.
Shaw v. *Benson,* 52 L.J. Q.B. 575.

There also arose two cases, one of a mutual insur-

ance association (*In re Arthur Average Association*, 44 L.J. Ch. 569), and another, the case of a trust investment company (*Sykes* v. *Beadon*, 48 L.J. Ch. 522); the associations in these two cases being held to be within the Act.

There then, however, arose the case of *Smith* v. *Anderson*, 50 L.J. Ch. 39, in the decision of which the Arthur Average Association case is criticized and doubted, and *Sykes* v. *Beadon* is disapproved and virtually overruled.

Smith v. *Anderson*, with the unanimous decision of James, L.J., Brett, L.J., and Cotton, L.J., fixed the law in England upon the questions herein involved; the case has never been overruled or modified, but is accepted as the leading case upon this question.

In *Smith* v. *Anderson* there was a trust of funds contributed by divers persons for the purchase of certain Submarine Company securities to be held and managed by the trustees; the "annual produce" to be applied to the expenses of the trust, the payment of interest on the certificates, and the redemption of the certificates or shares; the surplus income above 6 per cent being used for such redemption. Certificates of interest were to issue to subscribers, and the *cestui que trusts* might be very numerous. There was provision for an annual meeting of the certificate-holders for the purpose of (*a*) receiving report of the trustees, (*b*) appointing auditors, and (*c*) electing new trustees to fill vacancies, if any.

The Court of Appeal, overruling the master of the rolls, held that this was not an association under the Act of Victoria.

other relation whatever inter sese) and upon the trusts following viz:"

Mr. Justice LORING, in *Williams* v. *Milton, ut sup.*, at page 12, said:

> "Up to this time we have not alluded to the declaration in the indenture of trust herein questioned that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did in making the trust indenture that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did.'

See also *Taylor* v. *Davis*, 110 U.S. 330.

This matter of *intent* was also the deciding element in the Massachusetts cases arising from abortive attempts to create corporations.

In these cases the Courts have held that the result was an association, but not a partnership, because no partnership was intended by the would-be incorporators.

See *Ward* v. *Brigham*, 127 Mass. 24, at 27.

It was argued in the Court below, on behalf of the Collector, that the trusts in the case at bar were very similar to those discussed in *Roberts* v. *Anderson*, 226 Fed. 7, which was held taxable as a joint-stock company, and such argument may be repeated here.

If so, it seems only necessary to point out that that case involved the taxation in New York of the United States Express Company, which had been for many years doing business with some forty-five hundred offices, as organized under "Articles of Association" in which the associated parties had agreed that they "do

hereby severally and mutually covenant and agree to form a *joint-stock company* with the intent and purpose of doing and prosecuting a general express forwarding agency, commission, banking, exchange, and insurance business," etc. (see 226 Fed., foot of page 9), and it was averred by the United States Express Company that it was "an unincorporated association or partnership."

It is not surprising that the Court held that association taxable as a joint-stock association, under the laws of New York.

It is surprising that that case could ever have been suggested to the Court as having any similarity to the Wachusett Realty Trust under its strict trust declaration.

Reference at the argument in the Court below was made by counsel for the Collector to the case of *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall. 566, at 568. This case involved the Liverpool & London Life & Fire Insurance Company, with an immense business in England and the United States. The question in the case was whether the company was an "association" or was "incorporated." (See page 567.) No such question as is fundamental in the case at bar was suggested or dealt with in *Liverpool Insurance Company* v. *Massachusetts*, and the case cannot be availed of in comparison.

The report shows that Messrs. B. R. Curtis and J. G. Abbott, counsel for the Insurance Company, not only admitted, but argued, that their client was an association.

The Collector's counsel, at the argument in the Court

below, after a detailed analysis of the statute provisions, made this argument:

> "The real test as disclosed by these provisions, seems to be the following: If the net income belongs to the beneficiaries so that their respective shares may be determined even though payment of them is temporarily withheld, it is regarded as a trust, and the trustee pays the tax on each cestui's share, provided that share is large enough to be taxable, and deducts the tax thus paid from the cestui's interest; the tax is thus upon the sum of the taxable interests of the beneficiaries therein; if the net income belongs to the trustees, and the beneficiaries become entitled to it only when and as dividends are declared, then it is an association within the meaning of the Statute, and the tax is upon the total net income, not upon the sum of the taxable interests of the beneficiaries therein."

Should such argument be repeated here, it is submitted—

(*a*) That the test suggested is not accurately expressed, but—

(*b*) If it be accurately expressed, the Wachusett Realty Trust is a case of trust, and not association, because under article 3 of the declaration (Record, page 11) the distributed income of the Wachusett Realty Trust does belong to the beneficiaries, and—

(*c*) It is entirely unwarranted, and perhaps misleading, to use the word "dividends" in connection with the Wachusett Realty Trust income or its distribution. Such income distribution by the trustees of the Wachusett Realty Trust is no more a "dividend" than is the similar distribution of income by any trustee under any will in Massachusetts.

(*d*) It is submitted as significant that Congress in

the second Income-Tax Act of September 8, 1916 (39 Stats. 756), in attempting to clear up certain questions which had arisen as to trust income under the Act of 1913, distinctly puts such income under part I, dealing with individuals, and not under part II, dealing with corporations.

It is respectfully submitted that the conclusion from the foregoing must fairly be that there can certainly be no well-founded claim of "association" in the case at bar, based upon any theory of quasi-partnership among the trustees or beneficiaries of the "Wachusett Realty Trust."

Indeed, the Circuit Court of Appeals, in deciding this case, was apparently fully satisfied that there was no quasi-partnership, and that the plaintiffs were strict trustees of a pure trust.

The opinion refers to the rescript of HALE, J., in *Crocker* v. *Crocker* (quoted *ante*, page 23), and to the decision of BINGHAM, J., in this case, and says:

> "We agree with the District Court in this case and in Crocker v. Crocker that the organization formed under this declaration of trust is not . . . to be regarded as an association in such sense as to make the beneficiaries partners and the plaintiffs their agents . . ."

Also:

> "But although their beneficiaries stood, neither as to the trust property, nor as to the profits of its control and management, nor as to the income therefrom as partners, *but only as beneficiaries of*

of a strict trust [italics ours]; and although the plaintiffs were not the agents or representatives of a partnership but trustees in whose management and control of the trust property and business the beneficiaries had no direct voice . . ."

Opinion, Record, page 48.

We have perhaps unnecessarily amplified the foregoing (because much of it is rather familiar law), but we have not wished to leave the point in any doubt whatever, and we submit that the foregoing is practically a demonstration that no claim can properly be made in this case of any "association" on the partnership theory. If this be true, the plaintiffs must prevail unless there be some other valid basis for the claim of association.

Thus we come to discuss the next point:

Can the plaintiffs, as trustees, or their cestui que trusts, or both, be held to form an association within the terms of the Act, sec. II, G (a)—"every corporation, joint-stock company or association, and every Insurance Company organized in the United States, no matter how created or organized, not including partnerships"— on any other theory than that of partnership?

(*a*) Is it not rather a startling proposition of law that trustees of a *strict trust* are "created" or "organized" as an "association" in any sense whatever; or that their strict *cestui que trusts* are any more so?

(*b*) Is it not significant that the trust instrument provides as to a fund (which has always been simply invested in corporate shares and leased real estate)

for its conversion into money and distribution to "*cestui que trusts* who shall be trust beneficiaries only without partnership, associate or any other relation whatever *inter sese*"?

Declaration of Trust, Record, page 9, par. 1.

That this intent of the parties may be material is shown by the cases *Williams* v. *Milton*, 215 Mass. 1, and *Taylor* v. *Davis*, 110 U.S. 330.

Joint-Stock Associations.

"Joint-stock associations" have been known to the common law since the time of Queen Anne, and the term "joint-stock association" is, in the history of the development, more frequent than the term "joint-stock company." The former is the expression used by this Court in *Eliot* v. *Freeman*, 220 U.S., at page 186.

It is submitted that the words "joint-stock" in the Act of 1913 under discussion govern the word "association" just as much as the word "company," and that the intent of sub-section G (*a*) was to group only corporations and joint-stock companies similarly organized. It is submitted that this statute would have called for no different construction if the clause had read "joint-stock association or company" instead of "joint-stock company or association," and it is submitted that to hold the plaintiffs at the same time strict trustees of a pure trust and also a joint-stock association is unsound.

The law knows the corporation, the partnership, the trust, and, more recently, the joint-stock company, which is a large partnership organized for profit with

transferable shares and often some statute attributes.

The law does not know any other classification. Massachusetts law knows no unincorporated "association" for business or profit except the partnership association, and hence the Wachusett Realty Trust, conceded not to be a partnership, cannot be held a joint-stock association unless there be imputed to Congress an intent to use established legal terms in a new and purely colloquial sense.

It may be frankly admitted that Congress, in the Act of 1913, intended to broaden the language which had been used in the Act of 1909 and construed in *Eliot* v. *Freeman*, and therefore changed the language from "organized under the laws of the United States or of any State" to the language "organized in the United States, no matter how created or organized;" but we still have the word "organized," which was discussed by the Court in *Eliot* v. *Freeman*, where the Court said of the trusts then under consideration that they could "hardly be said to be organized within the ordinary meaning of that term." (*Eliot* v. *Freeman*, 220 U.S. 186, at 187.) Where, in the case of the Wachusett Realty Trust, shall we find any *organization* whatever, particularly in view of the agreement not to be associates of any kind?

It was certainly not intended by the Act to put fiduciaries in the same class with corporations, because, by section D, special provision is made for returns by all fiduciaries.

This brings us to a discussion of—

THE THEORY ADOPTED BY THE CIRCUIT COURT OF APPEALS, AND THE REASONING OF ITS OPINION.

For the convenience of the Court we have put at the end hereof, in Appendix B (*post*, page 60), certain quoted excerpts, so far as material here, from the Act of October 3, 1913 (38 Stats. 166-172), in which we have emphasized by heavier type the particular words important in this connection; and also in Appendix C hereto (*post*, page 64), certain of the Treasury Regulations and Decisions promulgated in accordance with the terms of the Act itself.

The Court of Appeals decides that the Act taxes two classes of income only; viz.: (*a*) *individual* income, and (*b*) *group* income. (Record, foot page 57.) It then decides that the income of the *cestui que trusts* is not *individual* income, "arising or accruing to them" as individuals, because the trustees, *though, in fact, they distributed the entire net income* (Record, foot page 14), had the right to make reserves therefrom (Record, page 48), and that the income was not "immediately available to the beneficiaries." (Opinion, Record, at foot pages 46, 47.)

It then decides that, unless the income be considered *group income*, it is not taxable under any "*express provisions*" of the Act; and therefore, despite its conclusion that the trust in question is a "strict trust," and the beneficiaries strict "*cestui que trusts*" (Record, foot page 48), it decides, on a forced and unnatural construction of the words "joint-stock association," that either the trustees and their *cestui que*

trusts or the *cestui que trusts* separately, or the "trustees collectively" (it is very doubtful which), formed such an "association," and were taxable as such.

The intent of the Court of Appeals is obscure in respect of the persons held to constitute the "association."

First the Court says the "association" is of the *trustees* and the *cestui que trusts*. (Opinion, Record, top page 49.) Then it says the *cestui que trusts* alone were associated (Record, page 49), and finally that the income was received by the *trustees collectively*. (Record, foot page 49). Would the decision have been different if there had been one trustee instead of five? Would it be different for another year if one of the beneficiaries had then bought the fractional shares of all the rest?

It is to be observed that to hold the plaintiffs liable to taxation as a "joint-stock association" under section G there must be found some association of the plaintiffs not acting "in any fiduciary capacity," because, by the terms of section D (Appendix, *post*, page 61), even corporations and associations "acting in any fiduciary capacity" are to be taxed as such, and not under G.

We may assume, for the argument, with the Court of Appeals, that the Act taxes, generally, two classes only of income, viz., *individual* income and income of corporations, joint-stock companies, etc., generally referred to by the Court as "group" income. It is not true that income of a strict trust actually paid to a beneficiary is not his *individual* income because his trustees had some discretion as to distributing or hold-

ing or applying it. All the net income was, *in fact*, distributed by the trustees. (Record, foot page 14.)

It must certainly be true that income *in fact received* by a beneficiary from his trustee is his *individual income*, "arising or accruing" to him entirely, regardless of any question as to whether the payment by the trustee to him was discretionary or not; and this even though it is the duty of the trustee to withhold and pay the normal tax on such income.

There is no doubt that trustees, as to income *in fact distributed*, are subject to the express provisions of section D, regardless of any question as to whether the distribution was required or discretionary. Payments under a spendthrift trust are illustrative.

The Error of the Circuit Court of Appeals.

The fundamental error of the Circuit Court of Appeals arose from its conclusion that the income in the case at bar cannot be taxed to the fiduciaries under any *express* provisions of the Act.

It may be granted that income received by trustees and held by them *undistributed* (and under such circumstances that perhaps no beneficiary could demand the same), would not be taxable to the trustee under any *express* provision of the Act, but it is not true that income *distributed* by trustees must not be returned by them, for taxation to them. This is made perfectly clear by reference to sub-sections D and E of the Act of 1913, the language of which is express and without reservation or exception, making it the duty of every trustee to make return to the Government of all income distributed to each beneficiary (if in excess of $3000 to any one), and making the trustee

liable to withhold and pay the Government the normal tax upon every share so disbursed by him if in excess of $3000—*except* that, if the income so paid over by trustees consists of dividends, to that extent the trustee is relieved from return and taxation because the beneficiary is entitled to receive such dividends free from the normal tax, and he is so entitled because the corporation is required to pay that normal tax on its earnings.

In other words, the reasoning of the Circuit Court of Appeals might possibly apply, in the case at bar, if the income in question had not been distributed by the trustees, or if there had been no distributees, but the income had been for accumulation under the trust. Such cases were dealt with by the Treasury Department by regulation, having resort to the fiction that, in such cases, the fund or trust estate should be regarded as the beneficiary, and the income taxed accordingly. Whether this regulation was valid or not is not in issue here.

In the case at bar the income was, in fact, all distributed, and therefore, by the *express* provisions of sub-sections D and E, the trustees were obliged to make return *as fiduciaries* and withhold and pay the Government the normal tax upon so much thereof as was not derived from dividends. They should be taxed accordingly.

The contention of the Collector in the case at bar is that the whole of the income, *including dividends*, is to be taxed to the trustees as the income of a joint-stock company or association, which means that the dividends forming part of the trust income would be taxed

despite the provisions of sub-sections D and E just above referred to.

It is perfectly clear that the taxation of the plaintiffs, as an association, is an exaction by the Government of much more than would be required if the taxation were to the plaintiffs as fiduciaries. It must be equally clear that the decision of the Circuit Court of Appeals is arrived at, in the last analysis, by giving a very strained construction to the words "joint-stock company or association."

Such strained construction of a Tax Act in favor of the Government is directly contrary to a recent and emphatic statement of this Court in *Gould* v. *Gould*, 245 U.S. 151, at 153, where the Court says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

It is here that the Court of Appeals made its first error, and in consequence, in mistaken attempt to bring the assessment under some "express provision" of the Act, obliged itself to resort to its forced construction of the words "joint-stock association."

It is error to say in the same breath that certain individuals are "*cestui que trusts*" under a strict common-law trust (see Opinion, Record, foot page 48), but that at the same time they, either by themselves or together with the trustees, form a "joint-stock association" under the Act of 1913.

Such a decision throws all legal classification into doubt, and tends to great confusion of legal principles.

It is perfectly clear, whatever classes of income be taxable, that section D (*and not section G*) distinctly provides for returns by fiduciaries of the net income of the persons for whom they act, and that the trustees shall be subject to all the provisions of the section which apply to individuals. (See Appendix, *post*, page 61.)

The income of an individual *cestui que trust* is collected by his trustee, who has to make return thereof and pay the tax thereon.

The Act required such returns and payments from fiduciaries as to all income collected by them whether absolutely and immediately payable by them to some named beneficiary or not.

There is no resulting confusion whatever if *individual income* be held (as the Treasury Department rules) to include, not only all income actually paid over by a trustee to his *cestui que trust*, but all income "arising or accruing" to individuals, "whether distributed or not." (See Regulations, *post*, Appendix, page 64.)

The opinion of the Circuit Court of Appeals lays down in unqualified terms the proposition (clearly unsound, as we submit) that the income received by the trustees of the Wachusett Realty Trust could not possibly be deemed income accruing, through the hands of the trustees, to the beneficiaries individually, in spite of the fact that it was actually distributed among them; the only reason given being that, under the provisions of the declaration of trust, the trustees, while they did not do so in fact, yet had the *power*, in their discretion,

to withhold income from distribution and apply it to the development and improvement of the trust property. It could not, therefore, the Court holds, be income taxable to the trustees as fiduciaries, under section II, D, of the Income-Tax Act. (Opinion, Record, page 47.)

This conclusion, and the reason given therefor, the Court appears to regard as beyond question, and it is on this assumption that the Court seeks some other express provision of the statute, under which the income might be taxed. In this way the Court was led to adopt a strained and unnatural meaning of the word "*association.*" For the Court says, in substance: "It is impossible to consider this income as individual income of the beneficiaries, to be taxed to their trustees, through whom they received it, and, unless we can find a way to bring it under the clause taxing the income of corporations and similar 'group income,' it will escape taxation under any express provision of the statute."

This proposition is contrary to the practice of the Treasury Department.

As shown above, it is not sound as a construction of the statute, and, if the error is not corrected, it will cause great doubt and confusion in the administration of the law, under the later statutes as well as under the Act of 1913.

The Circuit Court of Appeals in the opinion (Record, foot of page 48) says that, if the Wachusett Trust were to be treated as an association *because* a partnership, such an organization could not "be regarded as belonging to either of the classes mentioned in Sec. II G (*a*) because the language there expressly excludes partnerships."

The learned Court evidently did not agree that the partnerships referred to in section G were intended to be only the ordinary commercial partnerships of limited members, and was therefore driven to find some other theory of "association." The theory adopted by the Court is set forth in the opinion (Record, page 49), where the Court says:

> "The trust declaration in effect associates them for the purposes of allowing extra compensation to the trustees, of filling vacancies in the office of trustee, or of modifying the terms of the declaration itself, when it requires for those purposes written assent from a 'majority in amount' or a 'majority in interest.'"

In other words, the Court says that, although the beneficiaries can originate or do nothing, yet that, because the trustees cannot do certain things without the assent of their *cestui que trusts* therefore those *cestui que trusts* are associated together for assent purposes in such a way as to become a joint-stock association, taxable as such, although the assent is without meeting or conference, is not given as associate action, but is purely the individual action of each beneficiary.

It is submitted that this is giving a meaning to the words "joint-stock association" which has never been given before and which was never intended by Congress.

Also, if the Circuit Court of Appeals is correct as to the partnerships excluded from section II, G (*a*), it would follow that organizations like the McKay Sewing Machine Association could not be taxed under that section. (See *Gleason* v. *McKay*, 134 Mass. 419.) This would be a surprising result.

It is submitted (notwithstanding the rescript of the Court of Appeals, Record, page 57) that the opinion, holding that trust income cannot be taxed as income of the *cestui que trust* unless it be "immediately available" as such to him—and if not so available to a *cestui que trust*, still cannot be taxed as the income of the trustee—does create grave doubt as to the taxation (and even taxability) of the income from some or all of the following:

(*a*) funds held in trust for accumulation.

(*b*) funds under all spendthrift trusts;

(*c*) funds held in strict trust for the maintenance of various objects, charitable or otherwise;

(*d*) all family trusts under wills, as settlements for the "support" of widows, or the "education and support" of children, and—

(*e*) all estates in process of settlement, including not only estates of deceased persons, but estates administered under assignments for the benefit of creditors, and in bankruptcy, and held by receivers—

because in none of these cases could it be held that the income had become "immediately available" to the beneficiaries, nor could it possibly be held that there was any "corporation, joint-stock company or association" taking the income.

What Does Sub-Section G (a) Cover?

It might pertinently be inquired what section G (*a*) was intended to cover. The language is: "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no

matter how created or organized, not including partnerships."

It is submitted that this language would clearly include (saving the organizations exempted in paragraph (*c*)) every corporation duly organized by law, and every joint-stock company, such as the well-known partnership associations under the Pennsylvania law, and the joint-stock companies under the New York law, like the express companies; also joint-stock associations in Massachusetts, like the McKay Sewing Machine Association; but was never intended to cover groups or collections of individuals merely because they were all interested in some property or fund, held in strict trust for conversion into money and distribution among them, even though their trustees could not depart from the trust terms without their consent.

The words "not including partnerships" were probably used intending to refer to the ordinary commercial partnership of few members, to which the principle *delectus personarum* would apply, and not to all those business associations with numerous members and transferable shares which, in law, are held to result in partnerships where they have taken no other form legalized by statute.

The classification of the Act and Regulations is reasonably clear and is comprehensive. The opinion of the Circuit Court of Appeals leaves the law unfortunately vague and doubtful of application.

II.

This brings us to the second point, and the question raised in No. 1323:

Did the District Court Err in Deducting from its Claim for Taxes Assessed against them as an Association (for 1915) the sum of $1321.33, and Entering Judgment for the Balance Only, on the Theory that the Plaintiffs might have been Assessed as Fiduciaries for $1321.33 under Another Section of the Act?

No. 1323 is a cross writ of error, brought by the plaintiffs below, claiming that the judgment which was entered in their favor should have included the full amount of the tax which they were compelled to pay as an association for the year 1915, without deduction of the amount of the tax which, as fiduciaries, they might have been required to pay for the same year upon the basis of the return which they made as such fiduciaries.

The tax which the plaintiffs would have been liable to pay if they had been assessed upon the return which they made as fiduciaries for the year 1915 would have amounted to $1321.33 or 1 per cent on the amount of net income shown in said return. (See copy of Return, Record, page 28.) (See Opinion of the District Judge, Record, page 35.)

But no tax was assessed on that return, the Government treating it as void, and requiring another return for the same year upon the form prescribed for returns of corporations, joint-stock companies or associations. The plaintiffs, under protest, filed the return called for (Record, page 18), and were assessed thereon as an association a tax of $6990.18, which they paid under protest.

The defendant (Collector) claimed that, if the plain-

tiffs were not lawfully assessed as an association, but were taxable as fiduciaries, they could not recover the whole amount which they were required to pay under such unlawful assessment for the year 1915, but only the difference between that sum and the sum which, according to their return as fiduciaries, they might have been lawfully required to pay as such fiduciaries.

The Court below sustained the Collector on this point, and gave judgment accordingly. The conclusion of the District Court is stated in the opinion as follows (Record, page 35):

> "The plaintiffs, as above stated, in 1915 were assessed as an association and paid a tax of $6,990.18. They should have been assessed as trustees and have paid a tax of $1,321.33. Having paid more that year than they should have, they are entitled to recover the difference or $5,668.85."

The Court erred, it is submitted, in treating the case—

(1) as if the United States were the real defendant, and—

(2) as if it were simply a case where the plaintiffs had "paid more that year [1915] than they should have."

A suit against a Collector of Internal Revenue to recover taxes claimed to have been illegally exacted is not a suit against the United States.

See *United States* v. *Emery*, 237 U.S. 28, 31.

It is settled that in suits of this kind the plaintiff, if

successful, recovers interest. Interest cannot be recovered in an action against the United States.

Kenney v. *Conant*, 166 Fed. 720.
Treat v. *Farmers Loan & Trust Co.*, 185 Fed. 760.
Schell v. *Cochran*, 107 U.S. 625.
National &c. Home v. *Parrish*, 229 U.S. 494.
Gulf Oil Co. v. *Lewellyn*, 242 Fed. 709; affirmed in this Court Dec. 9, 1918.
Klock &c. v. *Harrison*, 212 Fed. 758.

A suit against a Collector to recover taxes paid under protest cannot be brought against the Collector's successor in office; it must be brought against the person to whom, as Collector, the taxes were paid, although he ceased to be Collector before suit brought.

Philadelphia &c. Co. v. *Lederer*, 242 Fed. 492.

If such an action has been commenced and the defendant Collector dies pending the suit, the cause of action survives, and the Collector's personal representative, not his successor in office, is the proper party to be summoned in to defend.

Patton v. *Brady, Exrx.*, 184 U.S. 608.

In *Philadelphia &c. Co.* v. *Lederer*, 239 Fed. 184, and in the same case in the Court of Appeals (242 Fed. 492, above cited), reference is made to a statute passed in 1899, under the provisions of which, by proper steps, successors of officers of the United States may be substituted for them in suits commenced against the latter in their official capacity. (Act of Feb. 8, 1899, c. 121;

U.S. Comp. Stats. 1913, sec. 1594.) It was pointed out that this statute is in terms intended to prevent the abatement of suits, by or against an officer of the United States in his official capacity, by reason of his death, or the expiration of his term of office, or his resignation or removal from office. It would seem that this statute cannot apply to suits to enforce the personal liability of a Collector for taxes wrongfully collected by him in his official capacity, for such a suit, as decided by this Court in *Patton* v. *Brady, Exrx.* (above cited), is one which survives, on common-law principles, and does not abate on the death of the defendant. *Patton* v. *Brady* was decided in 1902, and the action was commenced after the passage of the statute above referred to.

The nature of the action and the statutory provisions applicable are well summarized in the opinion of Judge Thompson in *Philadelphia &c. Co.* v. *Lederer*, 239 Fed. 184, at page 186:

> "(2) The cause of action in these cases is assumpsit upon an implied contract to return money unlawfully received. The nature of the action is clearly determined in the case of Patton v. Brady, Ex'x., 184 U.S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, where Mr. Justice Brewer reviews the prior cases, and it is held that, where a collector dies pending the suit, the suit survives against his personal representative. That upon a judgment in such an action the collector is personally liable and execution can, except for statutory provisions, be had against his property, there appears to be no doubt.
>
> "In suits brought against collectors of the revenue for acts done by them or for the recovery of money exacted by or paid to them and by them

paid into the treasury, Congress by the Act of Sept. 24, 1789, c. 20, 1 St. 92, reenacted by the Act of March 3, 1863, c. 76, Sec. 13, 12 St. 741, made it the duty of district attorneys to appear in behalf of the defendants in such suits unless otherwise instructed by the Secretary of the Treasury. Rev. Stat. 771 (Comp. St. 1913, Sec. 1296). And, in order to protect collectors from personal liability for official acts in proper cases, by section 12 of the Act of March 3, 1863, Rev. St. Sec. 989 (Comp. St. 1913, Sec. 1635), Congress provided:

" 'When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury.' "

The fact that upon a judgment in such an action the Collector is personally liable, upon common-law principles, and that, although his personal liability may in practice be rarely enforced, yet that it can and will be enforced unless the Court in its discretion makes a certificate of probable cause, as provided in the statutes, disposes of the contention that the action is "substantially" against the United States.

It is true that, if and when a certificate of probable cause has been obtained, it may be said that the action then, in a sense, becomes an action against the United States, and having in mind the statute provisions re-

ferred to, protecting the Collector from personal liability, some judges have described the action as "substantially" against the United States. But the judgment, in all cases, is entered as a personal judgment against the Collector, or his personal representatives in case of his death, and becomes payable by the United States only when a certificate of probable cause has been duly granted.

No certificate of probable cause has issued in this case.

There is no doubt that, but for the provisions of section 989 of the Revised Statutes (Act of March 3, 1863, sec. 12), the Collector would, in all cases, be liable personally on a judgment rendered against him in a suit brought to recover taxes illegally exacted.

It is only under the provisions of section 989 that such a suit can ever be the foundation of a claim against the United States. But section 989 only comes into operation, according to its terms, "when a recovery is had against the Collector, and the court certifies that there was probable cause," etc.

Not until the suit has reached the stage when it is ripe for final judgment, after the defendant's liability and the amount of the plaintiff's recovery have been determined by the verdict or finding, can it be said that a recovery has been had. And not until then may application be made to the Court under section 989 for a certificate of probable cause. Unless and until the certificate is granted, the defendant will not be relieved from liability to have the judgment enforced against him, nor will the plaintiff have any right to look to the United States for the satisfaction of the judgment.

It can never appear in such a suit, until recovery had by verdict or finding, fixing the amount to be recovered, whether or not the judgment will, by proceedings under section 989, be made a claim upon the treasury of the United States. How, then, can it be permissible for alleged claims in favor of the United States against the plaintiff to be set up by the defendant or considered by the Court or jury, by way of set-off or in reduction of damages? The Collector is the sole defendant. The United States is neither party to the record, nor privy, nor "substantially" the defendant. After recovery had, if the Court sees fit to certify as provided in section 989, the judgment becomes payable out of the treasury of the United States, and not otherwise.

The purpose and effect of section 989 are not to make the United States in any sense a party to the suit, but to protect the Collector, as an officer of the Government, from personal liability, when it appears to the Court that he was acting in good faith. The statute affords protection to the Collector, not by providing that the United States may be called upon to defend the suit, and be substituted for the Collector as defendant, as in cases of warranty, but by providing in effect that, in proper cases, execution shall be stayed on a judgment against the Collector, and that, instead of levying on the goods and estate of the Collector, the plaintiff shall have his judgment paid out of the treasury of the United States.

This is not a case like *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 322. In that case the Trust Company sought to recover of the Collector the amount

which it had been obliged to pay as a tax on capital employed in banking. It was held that the plaintiff was not entitled to recover the whole tax upon showing merely that the assessment was erroneous in that it had been computed on the theory that the company's entire capital was used or employed in banking, but that the plaintiff must go further, and show just what portion of the tax had been assessed on capital not so used or employed.

It was found by the Court that a portion of the plaintiff's capital was employed in banking, and, such being the fact, that the assessment of the tax by the Commissioner of Internal Revenue, though incorrect in amount, was not wholly void, and that the act of the Collector in collecting the tax was not altogether illegal. A portion of the tax assessed was legally due, and the Court held that the burden was on the plaintiff to show what portion was not legally due, and that it could recover only so much of the tax as it could show to be in excess of the amount legally due.

We believe that we have shown above that, in the case at bar, the assessment for the year 1915 was wholly void. The District Court so found and ruled. The Wachusett Realty Trust was not a corporation, joint-stock company, or association. The plaintiffs were not taxable at all as such association, nor as the officers or agents of such association; the assessment made by the Commissioner of Internal Revenue was therefore wholly illegal, and conferred no authority upon the Collector to exact any payment whatever from the plaintiffs.

In the Farmers Loan & Trust Company case it appeared that a part of the tax assessed and collected

was legally due from the Trust Company as a banking association. In the case at bar no part of the tax assessed upon the plaintiffs as an association was due and payable, for there was no such association.

The Farmers Loan & Trust Company case was decided upon the elementary rule that the burden is upon the plaintiff to prove his case, not at all upon the theory that the United States was the party defendant in any sense. The plaintiff in that case alleged that the Collector had unlawfully exacted from it payment of a tax without warrant of law and sought to recover it back. The Court decided that as to part of the tax, the Collector had not acted without warrant of law in collecting it, because the assessment made by the Commissioner of Internal Revenue, although erroneous and excessive, was not void. It was not void, because the Commissioner had jurisdiction under the statute to assess a tax upon the plaintiff as a banking corporation, it being found as a fact (although the plaintiff claimed otherwise) that a part of its capital was employed in banking. It appeared, therefore, that the plaintiff was entitled to recover from the Collector only so much of the tax as it could show to have been in excess of the amount which it ought to have been assessed *in manner and form as it was assessed.*

The theory of the Farmers Loan & Trust Company case was not that the defendant Collector had a good defense to set up by way of *set-off* or *counterclaim,* but that the plaintiff was unable to maintain its case as to the entire amount claimed.

In the case at bar, on the contrary, the plaintiffs have sustained their case as to the whole amount

claimed. The assessment of the tax of $6990.18 upon the trustees of Wachusett Realty Trust as an association was wholly void, and without warrant of law.

The assessment therefore conferred no authority upon the defendant to exact payment of $6990.18, or of any less sum.

The defendant Collector had no authority to collect any tax whatever from the plaintiffs for the year 1915. If they were liable as fiduciaries, under other provisions of the Income-Tax Law, no tax was ever demanded of them as such. The Collector has by law no authority to demand or collect any tax not first duly assessed by the Commissioner of Internal Revenue. No such authority is claimed on behalf of the Collector in this case. Yet it is claimed that the recovery against him should be reduced by the amount of the tax which might have been assessed against the plaintiffs *as fiduciaries.* This claim, it is submitted, is one which could only be set up by the United States in a proceeding in which the United States was a party.

If the judgment as entered below were to be affirmed as it stands, it is submitted that the plaintiffs would not be protected from a claim by the Government for taxes later assessed to them for the year 1915 *as fiduciaries.*

The United States is not a party to this record, and would not be concluded by the fact that, in giving judgment, the Court deducted the sum of $1321.33 as the amount of taxes which the plaintiffs appeared to be liable to pay to the United States for the year 1915 as fiduciaries.

If the decision of the Court below that the plaintiffs were not taxable as an association, but as fiduciaries, is affirmed by this Court, it is to be expected that the Government officials will forthwith seek to collect from the plaintiffs a tax for the year 1915. The Collector would have no authority to acknowledge that the tax had been collected by way of set-off, nor has the attorney of the United States who appears for the defendant in this case any authority to conclude the United States by stipulation or otherwise.

The District Attorney appears for the Collector in this case; not for the United States. He appears for the defendant under Rev. Stats. sec. 771, which provides that it shall be the duty of District Attorneys, "unless otherwise instructed by the Secretary of the Treasury, to appear *in behalf of the defendants* in all suits or proceedings pending in his district against Collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers and by them paid into the treasury."

It is submitted that the judgment below should be corrected so as to include the whole of the tax which was illegally collected of the plaintiffs for the year 1915, without deduction of the sum of $1321.33.

The law provides ample means to the Government for the collection of the tax due in respect of the year 1915 from the plaintiffs as fiduciaries.

Even if the time limited by statute for making an assessment by the Commissioner of Internal Revenue should have expired, the United States would not be without remedy, for a suit could be brought in the name

of the United States for the recovery of the tax due, although no assessment had been made, according to the rule laid down in *Dollar Savings Bank* v. *United States*, 19 Wall. 227; affirmed in *United States* v. *Chamberlin*, 219 U.S. 250-260.

It may be likely that the matter of the 1915 tax payable by the plaintiffs *as fiduciaries* would be taken up between the plaintiffs and the proper officers of the Government and would be settled without the necessity for resort to legal proceedings, but in such a way that the plaintiffs would obtain a proper voucher from the Collector, or from the Treasury Department.

But the plaintiffs should not be left in such position that, if, later, they be assessed *as fiduciaries*, they would have no better answer than that, in this suit of theirs against the Collector, the Court had taken such fiduciary liability into account.

No judgment in this suit can be *res adjudicata* against the Government. Nothing less than *res adjudicata* leaves the plaintiffs properly protected.

FELIX RACKEMANN,
HARRISON M. DAVIS,
Of Counsel.

APPENDIX A.

The Wachusett Realty Trust Declaration.

Know All Men by These Presents That we, Alvah Crocker and Charles T. Crocker both of Fitchburg in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the *cestui que trusts* (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever *inter sese*), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such

postponement, and until such conversion, the interests of the *cestui que trusts* shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple.

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several *cestui que trusts* according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc., (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale

of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise.

No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustees serving hereunder shall be obliged to give any bond, nor shall any Trustee have any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such

times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the *cestui que trusts* consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however

occasioned, shall be filled by the remaining Trustees by an instrument in writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the *cestui que trusts*, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust," and the term

"Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M. Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall heretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

In Witness Whereof we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

ALVAH CROCKER (Seal)
CHARLES T. CROCKER
JOHN J. RIKER
FELIX RACKEMANN
SAMUEL E. M. CROCKER

Commonwealth of Massachusetts

Worcester, ss. March 29, 1912.

Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed,

Before me,

....

Justice of the Peace.

APPENDIX B.

The Provisions of the Act.

Section II.

"A. Subdivision 1: That there shall be **levied, assessed,** collected, and paid annually upon the entire **net income arising** or accruing from all sources in the preceding calendar year **to every citizen** of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; . . .

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be **levied, assessed** and collected, upon the net income of every individual an additional income tax (herein referred to as **the additional tax**)" . . . All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of Paragraph A, shall apply to the levy, assessment and collection of the additional tax imposed under this section. **Every person** subject to this additional tax shall, for the purpose of its assessment and collection, make a **personal return of his total net income from all sources,** corporate or otherwise, for the preceding calendar year, **under rules and regulations to be prescribed by the Commissioner of Internal Revenue** and approved by the Secretary of the Treasury. For the purpose of this additional tax the **taxable income of any individual** shall embrace the share **to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not,** of all **corporations, joint-stock companies, or associations** however created or organized, . . ."

(The second paragraph of B provides for certain

deductions allowable in the case of individual returns, including, "seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided.")

> "D. . . . On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate **return, under oath** or affirmation, shall be made **by each person of** lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of $3,000 or over **for the taxable year,** to the collector of internal revenue for the district in which such person resides or has his principal place of business, . . . **in such** form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth, [etc.] . . . ; **guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals Provided,** That a return made by one of two or more joint guardians, trustees, executors, [etc.] . . . **under such regulations as the Secretary of the Treasury may prescribe,** shall be a sufficient compliance with the requirements of this paragraph; and also all persons, firms, companies, copartnerships, corporations, **joint-stock companies or associations,** and insurance companies, except as hereinafter provided, in whatever capacity acting, having **the control, receipt, disposal,** or payment of fixed or determinable annual or periodical gains, profits, and **income of another person sub-**

ject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing, [etc.] . . .

"E. . . . All **persons, firms,** copartnerships, companies, corporations, **joint-stock companies or associations,** and insurance companies, in **whatever capacity acting,** including lessees or mortgagors of real or personal property, **trustees acting in any trust capacity,** executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States **having the control, receipt, custody,** disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and **income of another person,** exceeding $3,000. for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, **are hereby authorized and required** to **deduct and withhold** from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax."

"G. (*a*) That the **normal tax hereinbefore imposed upon individuals** likewise **shall be levied, assessed, and paid** annually upon the entire net income arising or accruing from all sources during the preceding calendar year to **every corporation, joint-stock company or association, and every insur-**

ance company, organized in the United States, no matter how created or organized, not including partnerships. . . .”

“(*c*) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: . . .”

APPENDIX C.

The Treasury Rules and Regulations.

Article 74 of Regulations No. 33, dated January 5, 1914, provided for the tax to **fiduciaries** "having control of any portion of an annual income accruing during the year," for beneficiaries having a distributive interest, but the income not being distributed or paid over.

T.D. 2231 (superseding original Art. 70 of Regulations No. 33) provided, generally, that guardians, trustees, executors, etc., and all persons acting in any fiduciary capacity, who hold in trust an estate of any other person or persons, shall be designated the "source," "for the purpose of collecting the income tax." It then provided as follows:

> "Fiduciaries shall, on or before March 1 of each year, make and render a return, in form prescribed by the Commissioner of Internal Revenue, of the income coming into their custody or control and management from each trust estate when the annual interest of any beneficiary in the income of said trust estate subject to the normal tax is in excess of $3,000, and also when the undistributed income of the estate (as an entity or beneficiary in and of itself for tax purposes), consisting of income from dividends of corporations and other income (or of dividends alone), shall exceed $20,000. In such cases the estate shall be reported as a beneficiary for the undistributed income."

And also:

> "The income of trust estates, as any other income, is subject to the income tax. When such income is received annually by a beneficiary of an estate the fiduciary will withhold the normal tax due and subject to withholding by him. Any part

of the annual income of trust estates not distributed becomes an entity and, as such, is liable for the normal and additional tax, which must be paid by the fiduciary."

T.D. 2231 was amended by T.D. 2289 to read as follows:

"T. D. 2231 is hereby amended to provide that fiduciaries having control of any portion of income accruing during the year to known beneficiaries other than trust estates, as provided in T. D. 2231, but not distributed or paid to the beneficiaries during the year, shall, in rendering their annual return (Form 1041) give the name and address of each of said beneficiaries having a distributive interest in said income, and shall furnish all the information called for in such returns. In all such cases the fiduciary shall withhold and pay to the Collector, as provided by law, the normal tax of one per cent. upon the distributive interest of each of said beneficiaries, when such interest is in excess of $3,000, the same as if said income were actually distributed and paid to the beneficiaries," etc.

Note, in the foregoing, that the fiduciary is to "withhold and pay." It was in accordance with such Treasury Decisions and Regulations that all such cases have been uniformly taxed for several years.